

STATE OF MAINE

MAINE LABOR RELATIONS BOARD  
Case No. 10-UD-04  
Issued: February 23, 2010

_____	)	
MAINE STATE EMPLOYEES ASSOCIATION	)	
SEIU LOCAL 1989,	)	
	)	
Petitioner,	)	
	)	UNIT DETERMINATION
and	)	REPORT
	)	
MAINE COMMUNITY COLLEGE SYSTEM,	)	
	)	
Employer.	)	
_____	)	

PROCEDURAL HISTORY

This unit determination proceeding was initiated on October 23, 2009, when Maygan Hardison, a representative of the Maine State Employees Association-SEIU Local 1989 ("MSEA" or "Union"), filed a petition for unit determination and bargaining agent election with the Maine Labor Relations Board ("Board"). The petition sought a determination whether a unit consisting of "all adjunct faculty members of the Maine Community College System who teach credit courses or credit equivalent courses" should be created.<sup>1</sup> The Maine Community College System ("MCCS" or "System" or "Employer") filed a timely response to the petition on November 10, 2009, disputing that the adjuncts were regular employees covered by the University of Maine System Labor Relations Act or that the Act permitted the creation of a separate bargaining unit for adjuncts. The Employer also challenged the sufficiency of the showing of interest, providing a list of adjuncts employed in the fall semester of 2009. By letter dated November 17, 2009, the hearing examiner advised the parties that a confidential review of the showing of interest had

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<sup>1</sup>The Union has now agreed that the petitioned-for unit consists only of adjunct faculty who teach credit courses.

been completed and that the showing was sufficient within the meaning of 26 M.R.S.A. § 1025(2).

On November 30, 2009, the Union filed a Motion for Immediate Election, with argument. The Employer requested the opportunity to respond to the motion, and did so on December 2, 2009. On December 3, 2009, the executive director issued a decision denying the motion. On that same date, a unit determination hearing notice was issued for a hearing scheduled for December 15, 2009. The parties agreed that the Employer could electronically transmit the notice to the adjuncts then teaching in the fall semester and that this would constitute sufficient notice.

An evidentiary hearing on the unit determination petition was conducted by the undersigned hearing examiner on December 15, 2009, with two additional days of hearing on December 17 and 18, 2009, at the Board's hearing room in Augusta, Maine. The Union was represented by Roberta L. deAraujo, Esq., and Alison Mann, Esq. The MCCS was represented by Linda D. McGill, Esq. The MCCS presented as its witnesses: Kim Ehrlich, Director of Human Resources for the MCCS; Tina Erskine, Washington County Community College Human Resources Manager and Assistant to the President; and Janet Sortor, Southern Maine Community College Vice President and Dean of Academic Affairs. The Union presented as its witnesses: Mark Dion, Mary-Beth Taylor, Iris Selig, Richard Snodgrass, and Lauritz Dyrberg, all adjunct instructors for the MCCS. The parties were afforded full opportunity to examine and cross-examine witnesses, to present evidence and to make argument. The parties agreed and adhered to a briefing schedule: briefs for both parties were filed electronically on January 20, 2010. Reply briefs for both parties were filed electronically on January 22, 2010.

### JURISDICTION

The jurisdiction of the hearing examiner to hear this matter and to make an appropriate unit determination lies in 26 M.R.S.A. § 1024-A. The subsequent references in this report are all to the University of Maine System Labor Relations Act ("University Act" or "UMSLRA"), Title 26, Maine Revised Statutes Annotated.

### STIPULATIONS

1. The Maine Community College System adjunct faculty are not and have never been members of the faculty bargaining unit represented by the Maine Education Association.

2. Certain faculty, as described in a Form 1 on file with the Maine Labor Relations Board October 9, 1986, in the University of Maine System are represented for purposes of collective bargaining in a bargaining unit separate from the regular, full-time faculty.

### EXHIBITS

The following exhibits were offered by the MCCS without objection by the Union, and were admitted into the record at the hearing:

<u>Exhibit No.</u>	<u>Title/Description</u>
MCCS Exh. No. 1	History of the Community College System
MCCS Exh. No. 2	Collective bargaining agreement between MCCS and MEA, 2007-2009
MCCS Exh. No. 3	Standard adjunct faculty contract

The following exhibits were offered by the Union without objection by the Employer, and were admitted into the record at the hearing:

Union Exh. No. 1	Adjunct pay scale for SMCC
Union Exh. No. 2	Adjunct pay scale for EMCC

- Union Exh. No. 3      Adjunct pay scale for KVCC
- Union Exh. No. 4      Adjunct pay scale for WCCC
- Union Exh. No. 5      Collective bargaining agreement between  
University of Maine System and Part-time  
Faculty Association
- Union Exh. No. 6      Adjunct pay scale for NMCC

The Union submitted the following exhibits after the hearing was concluded but while the record remained open. They were also admitted:

- Union Exh. No. 7      Matrix of courses taught by adjuncts by  
college and by department in fall 2009  
and spring 2010, with summary
- Union Exh. No. 8      Summary of percentage of adjuncts  
teaching in both spring 2009 and fall  
2009 by college

#### FINDINGS OF FACT

1. The MCCS is a covered public employer within the meaning of § 1022(1-C) of the University Act.
2. The MSEA is an employee organization within the meaning of § 1022(1-B) of the University Act.
3. The MCCS is the state's public sector two-year college system. The mission of the System is to create an educated, skilled and adaptable labor force which is responsive to the changing needs of the economy of the state and to promote local, regional and statewide economic development (20-A M.R.S.A. § 12703).
4. The MCCS began in 1946. At that time it was called the Maine Vocational Technical Institute, under the umbrella of the Maine Department of Education. Additional VTI campuses were added in the 1960's. In 1986, the six VTI's were separated from state government and given their own independent structure. In 1989, the name of the VTI's was

changed to Technical Colleges to more accurately reflect their role as institutes of higher learning. A seventh campus was added in 1995. In 1999, the Technical College System began offering the Associate of Arts degree. In 2003, the System was renamed the Maine Community College System.

5. The System currently has seven campuses, with varying degrees of enrollment: Southern Maine Community College (SMCC), Central Maine Community College (CMCC), Kennebec Valley Community College (KVCC), Eastern Maine Community College (EMCC), York County Community College (YCCC), Northern Maine Community College (NMCC), and Washington County Community College (WCCC). The SMCC is by far the largest campus in the System, with an enrollment of 6,240, or about half the enrollment in the System. Each college in the System has a president, a dean of finance and a vice president or academic dean. Other administration and management differ from college to college.
6. The System confers both Associate of Arts and Associate of Science degrees in the technical trades and liberal arts, as well as various one-year certificates.
7. The student enrollment has grown substantially in recent years, and especially since the System began offering the Associate of Arts degree. Enrollment grew 78 percent from 1989 to 2001. Since 2002, degree enrollment has grown by an additional 47 percent. In 2002, there were 7,518 matriculated students in the System. In 2009, there were 13,746 matriculated students in the System. Despite the recent increase in enrollment, the number of regular faculty has remained relatively static; required additional course offerings are taught by adjuncts.
8. The System employs approximately 1650 people. Of this number, approximately 750-800 people serve as adjunct

instructors. Of the remaining employees, approximately 781 employees (about 92 percent) are represented for purposes of collective bargaining in five system-wide bargaining units. The faculty bargaining unit is represented by the Maine Education Association (MEA). The administrative staff bargaining unit is represented by the MEA. The support staff bargaining unit and the supervisory staff bargaining unit are both represented by the MSEA. Security personnel are included in the support staff bargaining unit. The institutional services staff bargaining unit is represented by AFSCME, Council 93. Approximately 71 full-time employees (not adjunct instructors) are excluded from collective bargaining due to the nature of their work (confidential, etc.).

9. The System employs approximately 341 regular faculty members, most of whom work full time. The faculty bargaining unit was created in 1977 by agreement of the parties after the initial passage of the University Act. The current collective bargaining agreement for this unit recognizes the MEA as representing all "faculty and instructors in the Community College pursuant to 26 M.R.S.A. § 1022." This agreement also covers part-time faculty (employed in established bargaining unit positions with a workload that is less than the established full load range for the department).
10. Adjunct instructors ("adjuncts") were employed in the VTI system when the University Act was enacted in 1975. Their numbers have grown substantially since that time, and particularly since the transition to the community college system in 2003. Adjuncts are used to teach a wide variety of credit and non-credit courses in the System. Their use varies widely from campus to campus and from department to department. The courses offered by some departments are

rarely if ever taught by adjuncts; the courses offered by some departments are taught exclusively by adjuncts. The use of adjuncts is particularly heavy in the teaching of general education courses (English, math, etc.) required for the completion of the Associate of Arts degree.

11. In the fall of 2009, adjuncts taught an average of 39.2 percent of the courses offered across the System. In the spring of 2010, it is estimated that adjuncts will teach an average of 45.1 percent of the courses offered across the System. At the largest two colleges, the percentage is higher. At SMCC (which offers twice the courses of any other college in the System), 56.4 percent of the courses were taught by adjuncts in the fall of 2009 and it is estimated that adjuncts will teach 53.4 percent of the courses in the spring of 2010. At CMCC, 53.1 percent of the courses were taught by adjuncts in the fall of 2009 and it is estimated that adjuncts will teach 60.7 percent of the courses in the spring of 2010.
12. At SMCC, administrators tracked the usage of adjuncts at that college.<sup>2</sup> The number of adjuncts employed and the number of courses they have taught have remained relatively stable in the recent past. The following is the number of adjuncts and the percentage of courses taught by adjuncts for the past five semesters: fall, 2007 - 273 adjuncts, 57.7 percent of courses taught by adjuncts; spring, 2008 - 256 adjuncts, 54.1 percent of courses taught by adjuncts; fall, 2008 - 273 adjuncts, 54.4 percent of courses taught by adjuncts; spring, 2009 - 263 adjuncts, 48.3 percent of

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<sup>2</sup>Personnel files are not kept regarding adjuncts and adjunct contracts are often not maintained or inconsistently maintained from college to college. Some of the findings of fact were therefore based upon Union compilations which were, in turn, based upon course catalogs and recent lists of adjuncts employed in the system. The information regarding the use of adjuncts at SMCC was compiled by Dr. Sortor.

courses taught by adjuncts; fall, 2009 - 287 adjuncts, 57 percent of courses taught by adjuncts. The number of regular faculty has remained steady during this time period, at about 110.

13. Before a course is offered to be taught by an adjunct, the regular faculty have the right of "first refusal" on teaching the course. Faculty teaching a full-time course load or even other full-time employees of the System may elect to teach a course for the extra income, or other reasons.
14. When an adjunct accepts employment, he or she signs a contract that is uniformly used by the colleges in the System. Usually a separate contract is signed for each course taught, even if an adjunct is teaching more than one course in a semester. The contract states that employment is "at will" and that the contract "creates no substantive or procedural rights arising from the termination" of employment. The employment is contingent on "adequate enrollment and funding and upon educational, personnel and programmatic judgments as determined by the college in its sole discretion" (Emp. Exh. 3). It is possible that, based upon lack of enrollment, an adjunct may not in fact teach a course although he or she may have signed a contract to teach it. It is the experience of some adjuncts that if a course is cancelled, they are offered another course to teach by the college.
15. The frequency that any given adjunct works for the System varies greatly. Some individuals teach a single course as an adjunct and never teach again as an adjunct. Some teach several courses every semester over many academic years. Some teach episodically (such as a specialized course offered every fall). On average, most adjuncts teach one to two courses in a semester.

16. By comparing the list of adjuncts who taught in the spring of 2009 with the list of adjuncts who taught in the fall of 2009, it can be concluded that between 59.4 percent and 69.7 percent of the adjuncts taught in both of these semesters, depending on the college.
17. The manner in which adjuncts are hired is variable and, compared to the manner in which regular faculty are hired, casual. An adjunct may be hired after sending a resume to the college, after being referred by another employee, or after having interviewed for another position or having some other connection with the college. At SMCC, the far largest employer of adjuncts in the System (250-300 adjuncts per semester), the chairs of each department independently solicit and hire adjuncts. They may consult with the college Vice President in hiring, but rarely do so. At CMCC, the department chairs also hire and schedule adjuncts. At WCCC (18-25 adjuncts), the Academic Dean hires all the adjuncts directly. The colleges attempt to hire adjuncts with the same qualifications as the qualifications of the regular faculty.
18. The hiring of regular faculty is considerably more formal, and governed by the faculty collective bargaining agreement and by the policies of the System. Faculty vacancies are posted. A search committee is assembled, which may include the academic dean, the human resources manager, faculty members, and other employees. The search committee recommends final candidates; the president of each college interviews the final candidates and hires from amongst them.
19. Adjuncts can be offered continuing employment in the System; that is, the opportunity to teach one or more courses from semester to semester. There is no policy or practice in the System preventing this. Based on their experience and their relationship with their department chairs, some adjuncts

have the reasonable expectation that they will teach some courses from semester to semester unless that are told otherwise.

20. Examples of adjuncts who have been offered continuing employment in the System are as follows: Richard Snodgrass has taught as an adjunct at CMCC consistently since the fall of 2005. His average course load has been two to three courses per semester. His department chair sends adjuncts a table of available classes each semester and asks adjuncts which classes they want to teach. Iris Selig has taught as an adjunct at CMCC since the spring of 2006. Her average course load has been two courses per semester. Her department chair contacts her a few months before each semester to ask what courses she wants to teach. Mark Dion has taught the same criminology course at SMCC 12 times in the past ten years (Dion took a four year break in teaching to attend law school). Unless Mr. Dion hears otherwise from his department chair, he knows that he will be scheduled to teach the course in each coming semester. Lauritz Dyhrberg, a retired high school teacher, first taught as an adjunct at SMCC in the fall of 2005 when he was asked to develop and teach a course in Maine history by the history department chair. After teaching this course for two semesters, he began teaching a second history course and has, since that time, taught two courses per semester. Mary-Beth Taylor taught three courses per semester as an adjunct at CMCC from the fall of 2003 until the spring of 2006. She left to take a full-time job with another employer and recently asked the department chair if she could return to CMCC as an adjunct. She taught two classes in the fall of 2009 and is teaching one class in the spring of 2010.
21. At SMCC and CMCC, department chairs decide whether or not to re-employ adjuncts who wish to be re-employed. The decision

not to retain an adjunct is occasionally brought to the attention of the president of the college where the adjunct taught.

22. Faculty may only be terminated for "just cause" pursuant to the collective bargaining agreement. A termination may be grieved and brought to arbitration.
23. The primary duty of adjuncts is to prepare and teach the course or courses that they are employed to teach. Adjuncts are not provided offices, although some shared space is available at some colleges. Adjuncts are not required to keep office hours, but most find ways to allow students to contact them for assistance or questions (providing email addresses and phone numbers, arriving early or staying late to their scheduled class, etc.). Adjuncts do not act as formal advisors to students, or oversee independent projects. Adjuncts do not sit on college governance and standing committees and do not attend regular faculty meetings. The colleges often provide an orientation meeting for adjuncts in the fall.
24. The primary duty of the faculty members is also to prepare and teach the courses they are employed to teach. Faculty generally have an assigned office and maintain office hours. They are required to act as student advisors. They oversee independent projects. They advise student clubs and organizations. They sit on governance and standing committees. They are invited to attend faculty meetings.
25. There is no system-wide salary scale for adjuncts. Adjuncts are typically paid based on a per-credit fee; most courses taught by adjuncts are three credits. Some colleges in the System pay a flat fee to adjuncts for a three-credit course regardless of their education or experience. For instance, YCCC pays adjuncts \$2000 per three-credit course; CMCC pays adjuncts \$1,875 per three-credit course. Other colleges

maintain an adjunct salary scale or matrix which takes into account teaching experience and/or education. These scales range from the lowest (NMCC - \$768 to \$1,440 for a three-credit course) to the highest (SMCC - \$1,839 to \$2,469 for a three-credit course). Adjuncts are paid no benefits, with the exception that the System contributes to the Maine Public Employees Retirement System for any adjunct who participates in the retirement system through other employment.

26. The pay and benefits for the regular faculty are outlined in the collective bargaining agreement. Full-time faculty are expected to teach a full-time course load, also defined in the agreement and varying from college to college (generally 15-18 credit hours taught per semester). The agreement contains a system-wide salary matrix of steps and levels. For instance, a full-time faculty member with a bachelor's degree may be paid an annual salary between \$32,590 (Step A, Level IV) and \$70,284 (Step Y, Level VI). Regular faculty progress a step every year after satisfactory evaluation. The agreement provides for a wide variety of benefits, such as health insurance, dental insurance, life insurance, tuition waivers, funds for professional development, etc.
27. Adjuncts do not receive evaluations about their performance from college personnel or administration; nor are personnel files maintained on them. Rarely is their teaching performance directly observed by college personnel or administration. Students are asked to complete written evaluation for all of their courses, whether they are taught by regular faculty or by adjuncts. Adjuncts are given copies of their student evaluations.
28. The evaluation of faculty members is prescribed by the terms of the collective bargaining unit. Faculty members must be evaluated on a yearly basis (twice yearly for probationary

faculty members). Faculty/management evaluation committees exist at each college, with regular faculty holding half the seats. The agreement provides that all monitoring or observation of faculty members for purposes of evaluation must be done with the knowledge of the faculty member.

29. Each college in the system prepares its own annual budget proposal. A System-wide budget is then compiled and proposed to the Legislature. The money budgeted for the hiring of adjuncts at each college is a "salary pool" considered sufficient to cover adjunct costs (which consist primarily of the pay they receive). The dollar amount of the pool is estimated according to the previous year's expenditure on adjunct services. The actual cost of adjunct services for a particular year may be under or over the projected budget. Faculty and other positions are "costed out" on the basis of the number of positions to be employed.

#### DISCUSSION

The unit petitioned for by the Union is "all adjunct faculty members who teach credit courses." Both the MCCS and Union argue (for different reasons) that the hearing examiner should not attempt to create any other adjunct bargaining unit than the one as petitioned for by the Union (for example, a unit that excludes newly-hired adjuncts or includes only adjuncts that have taught a certain number of semesters in a certain period of time). The hearing examiner accepts this limitation, and will limit her decision to whether or not "all adjunct faculty members who teach credit courses" is an appropriate bargaining unit that may be created under the terms of the UMSLRA.

The primary arguments raised by the parties are as follows: First, are adjuncts "regular employees" as defined by § 1022(8)? Second, do the adjuncts share a community of interest with each other and/or with the present faculty unit? Third, under the

circumstances presented, may an additional bargaining unit be created under the limitations set forth in § 1024-A? The hearing examiner will address these questions in turn below.

Are adjuncts "regular employees" as defined by § 1022(8)?

Section 1022(11) of the University Act defines the employees covered by the act as follows: "University, academy or community college employee" means any **regular employee** of the University of Maine System, the Maine Maritime Academy or the Maine Community College System performing services within a campus or unit . . . ." Section 1022(8) defines "regular employee" to mean ". . . any professional or classified employee who occupies a position that exists on a continual basis." While the University Act definition of covered employees is structured similarly to the definition of covered employees under the Municipal Law and the State Employees Act<sup>3</sup> - covering employees of the respective covered employer, with discrete and defined exceptions - only the University Act has the added requirement that covered employees be a "regular employee" who occupies a "position that exists on a continual basis." This language is unique to the UMSLRA.

The University Act was enacted in 1976. Since that time, the Board has rarely been called upon to hear appeals of unit questions under this Act. See Maine Maritime Academy v. MSEA, No. 03-UCA-01, slip op. at 3-4 (MLRB May 15, 2003) (outlining past Board and hearing examiner unit cases under UMSLRA). To the extent that the Act parallels the Municipal Law (enacted in 1969) or the State Employees Act (enacted in 1974), the Board has used precedent under those acts to interpret the UMSLRA. Id., at 4, 8. However, to the best of the hearing examiner's knowledge, the Board has never been called upon to evaluate the unique term "regular employee" used in the University Act, which has no

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<sup>3</sup>Municipal Public Employees Labor Relations Law's definition of "public employee" at § 962(6); State Employees Labor Relations Act's definition of "state employee" at § 979-A(6).

parallel in either the Municipal Law or the State Employees Act. Further, the hearing examiner has not found, nor have the parties suggested, that any legislative history sheds light on the meaning of this term, or why it was part of UMSLRA though not in previously enacted state labor relations laws.

One hearing examiner evaluated the language not long after UMSLRA's enactment, in Associated Faculties of the University of Maine and the University of Maine, No. 77-UD-02 (MLRB Aug. 4, 1978). In that case, the parties had stipulated to the parameters of the University faculty bargaining unit. Left in dispute were whether "soft-money"<sup>4</sup> faculty not on tenure track and librarians should be included in that unit. The hearing examiner found that "soft-money" faculty not on tenure track were employed under very similar terms and conditions as the other faculty. The project term for most soft-money employees was three years and, in many cases, grants were renewed rather routinely or substitute money was found to continue a project. The University argued that the soft-money positions did not exist on a "continual basis" but were instead positions "created to fill a need and temporarily accorded faculty rank, but only for the term of a project or grant." The hearing examiner found that the soft-money faculty were regular employees, as defined, reasoning:

There is nothing in the language which the Legislature has used which indicates an intent to deny the benefits of the Act to employees under the Act solely on the grounds that their future with the University may be less than secure, or that a position may lose its funding basis after a period of time. . . . A reasonable reading of the definition of regular employees, vis, "any professional or classified employee who occupies a position that exists on a continual basis," means nothing more than the position should not exist on an interrupted, irregular or occasional basis; the position need not be interminable.

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<sup>4</sup>According to the decision, soft money was non-University funds, usually from grants for specific research or innovative enterprises funded by governmental or private foundation funding sources.

AFUM and University of Maine, at 8 (emphasis supplied).

While the facts of the AFUM case were considerably different from the present matter, the hearing examiner was certainly correct that the meaning of "regular employee" must be derived from a "reasonable reading" of the language that the Legislature chose to use when enacting the Act.

The use of the term "position" is unique in the Act. The Employer argued that adjuncts do not hold a "position" because their employment is paid from a general salary pool maintained by each college for the purpose of purchasing adjunct services. Regular faculty positions, by contrast, are costed out individually, and budgeted and funded on an on-going basis. This is an interesting argument, but one which was not ultimately persuasive. The budgeting process was described only briefly in testimony; the fact that adjuncts are paid out of a general pool does not seem to equate with any inherent limits on funding the adjunct services.<sup>5</sup> The nature of adjunct employment (whereby adjuncts are paid based on credit hours taught, with essentially no other benefits or cost items) allows it to be budgeted in this pooled fashion. This does not prove that adjuncts do not "occupy a position" when they teach classes at the college, only that their positions are in many ways different from the faculty positions (and cost the System far less). In sum, the manner in which adjuncts are funded may be a relevant consideration here, but the funding alone does not prove that adjuncts do not hold a "position." Ultimately, the hearing examiner concludes that the term "position" in § 1022(8) means nothing more specific or unusual than "employment," "work" or a "job." Further, separating the term "position" from the remainder of the

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<sup>5</sup>There was no testimony, for example, that the use of adjuncts was ever curtailed because the amount budgeted for the salary pool was underestimated. The existence of the salary pool does not, in itself, prove that the adjuncts do not hold positions. It more seems to prove that the MCCS has a great deal of flexibility in utilizing adjuncts.

statutory language - "occupies a position that exists on a continual basis" - does not aid in interpreting that language.

Do the adjuncts occupy a "position that exists on a continual basis?" The hearing examiner finds that they do for two reasons. First, the evidence was overwhelming that adjuncts are a large and indispensable part of the teaching faculty in the Community College System. While their use varies somewhat among campuses and among departments, about 40 to 45 percent of all the course sections offered in the System are taught by adjuncts. As adjuncts are particularly used to teach general education classes (essential to the conferring of an Associate of Arts degree), there is no reason to believe that their use in the System will decrease in the foreseeable future. The Union has made a very strong case that adjuncts as a class of employees or as a pool of employees exist on a continual basis in the Community College System; their use is too large and consistent to conclude otherwise. The fact that the position of adjunct truly exists on a continual basis within the System may be sufficient, without more, to support a conclusion that they are "regular employees" within the meaning of § 1022(8).

In addition, because the System relies so heavily upon the existence of adjuncts, individuals employed as adjuncts appear able to maintain a level of employment continuity if they choose to do so.<sup>6</sup> This conclusion is supported by the record in the

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<sup>6</sup>The Supreme Court of New Hampshire has also recognized the connection between the need for adjuncts and their continuity of employment, in affirming the finding of the Public Employee Labor Relations Board that certain college adjunct instructors were not "temporary" employees:

" . . . [the Board's] conclusion, amply supported by the evidence that 'the college would be hard put to operate without its established cadre of adjunct lecturers,' is relevant to determining whether the adjuncts have a 'reasonable expectation of continued employment.' The nature and extent of the college's reliance upon the adjunct faculty could reasonably lead them to expect that the college would be likely to rehire them."

following two ways. First, the Union presented evidence (Union Exh. No. 8) that over 60 percent of the employees who served as adjuncts in the spring of 2009 also served as adjuncts in the fall of 2009 (the hearing examiner found this quite compelling evidence of continuity, considering especially that this was continuity that existed between traditional school years, not simply within a traditional school year). Second, the testimony of the Union witnesses, while necessarily anecdotal, clearly supported a conclusion that an adjunct who wanted to teach with some regularity could do so. The individual adjunct contracts do not promise continuing employment; on the other hand, there is nothing in the contract nor is there any System policy that prevents the re-employment of adjuncts on some regular basis. It is logical that adjuncts who fulfill their teaching roles satisfactorily would be used again if the adjuncts desired it, thereby saving the System time and money in always recruiting adjuncts with no MCCS experience.

While it would have been preferable to have more information about the continuity of adjunct employment over a longer period of time, the hearing examiner concludes that the Union evidence was sufficient on this point. The System apparently maintains limited records regarding adjuncts that have been employed in past years, and there is inconsistent record-keeping among colleges regarding the use of adjuncts. If the Employer had evidence to counter the evidence of adjunct employment continuity, it did not seek to keep the record open to present it.

In conclusion, the significant need of the System for adjuncts combined with the *de facto* continuity of the employment

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Appeal of the University System Board, 795 A.2d 840, 845-846 (NH, 2002). While cases from other jurisdictions must be read with caution due to the unique language of our University Act, the connection found by the Court in this decision is instructive.

of individual adjuncts support a conclusion that adjuncts occupy a "position that exists on a continual basis" within the meaning of § 1022(8) and thus are covered employees protected by the University Act.

Do the adjuncts share a community of interest with each other and/or with the present faculty unit?

It must be noted first that the Employer has not argued that the adjuncts do not share a community of interest amongst themselves; rather the Employer has focused on the similarities between the adjuncts and the regular faculty. Based on long-standing Board precedent, however, the first issue to be addressed in a unit determination hearing is whether the unit as petitioned for by the Union is appropriate - not whether some other variant bargaining unit is appropriate. Town of Yarmouth and Teamsters Local Union No. 48, No. 84-A-04, slip op. at 4 (MLRB June 16, 1980). Only in very rare circumstances has the Board considered an alternate bargaining unit, and then only after determining that the unit as proposed in the petition is not appropriate.<sup>7</sup> Therefore, there was really no argument presented that the adjuncts do not share a community of interest.

If the hearing examiner were required to determine whether the adjuncts share a community of interest, it is clear from a review of the factors as outlined in Chap. 11, § 22(3) of the Board Rules that they do: (1) (*similarity of work performed*) -

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<sup>7</sup>See, e.g., SAD #49 Educational Tech I Assoc/MEA/NEA and MSAD #49 Board of Directors, No. 09-UD-09 (MLRB May 6, 2009) and cases cited therein. Further, the Employer here has not argued that a specific alternative bargaining unit is appropriate while the petitioned-for unit is not. The Employer has suggested that there may be a subset of adjuncts whose employment history establishes that they hold a position that exists on a continual basis, but it seems that the record-keeping regarding adjunct employment would make such a delineation impossible. As to the similarity between adjuncts and regular faculty, the Employer has made no suggestion that the hearing examiner is somehow empowered to place adjuncts in the long-standing faculty bargaining unit.

they perform similar work under similar conditions; (2) (*common supervision*) - they sign similar employment contracts and are similarly supervised, meaning that they have virtually non-existent direct supervision or evaluation; (3) (*similarity in earnings*) - they have relative similarity in scale and manner of determining earnings despite some slight variation between colleges; (4) (*similarity in benefits and hours*) - they have similar benefits - basically none - and their hours of work and terms and conditions of employment are similar; (5) (*similarity in qualifications*) - they have relatively similar qualifications, skills and training on the record as presented; (6) (*frequency of contact*) and (7) (*geographic proximity*) - they have infrequent contact or interchange and they do not have geographic proximity, but these factors are of little importance as the University Act requires that all bargaining units be created on a System-wide basis; (8) (*history of collective bargaining*) and (10) (*extent of union organization*) - they are essentially the last group of unrepresented MCCS employees who have an arguable right to be represented for purposes of collective bargaining; (9) (*desires of affected employees*) - to the extent known, the adjuncts wish to be represented by MSEA for purposes of collective bargaining in a separate bargaining unit; and (11) (*employer's organizational structure*) - the adjuncts basically hold the same position within the Employer's organizational structure at each college. For all these reasons, the adjuncts share a community of interest, and are an appropriate bargaining unit based on these factors.

Although a limited amount of evidence was presented regarding the terms and conditions of employment for the faculty in the System, the adjuncts do not appear to share the same community of interest with them that they do with each other. Even if there were a significant community of interest between the faculty and the adjuncts, there is nothing the hearing

examiner could "do" with that fact in the context of determining the present petition. The parties have stipulated that the adjuncts are not part of the faculty bargaining unit and never have been in the 30-year history of that unit. The provisions in the faculty collective bargaining agreement regarding part-time faculty do not pertain to adjuncts. The faculty unit is represented by a different bargaining agent (Maine Education Association) which has not heretofore expressed an interest in representing the adjuncts, nor have they petitioned to intervene in the present matter. The Employer has not petitioned to add the adjuncts to the faculty unit (nor is it clear that the Employer could do so without some evidence that adjuncts wish to be represented by MEA). The showing of interest signed by the adjuncts do not indicate that they desire to be represented by MEA. Under these circumstances, there is no legal mechanism whereby the adjuncts may be placed into the faculty bargaining unit. As the adjuncts have established that they share a community of interest, the only outcome permitted here would be to approve the creation of the unit as petitioned for by the Union or to dismiss the petition if the University Act prevents the creation of an additional unit, as the employer argues. This final argument will be addressed next.

May an additional bargaining unit be created under the limitations set forth in § 1024-A?

The last issue presented here is whether the terms of the University Act prevent the creation of an adjunct bargaining unit in addition to the bargaining units already enumerated in § 1024-A. Section 1024-A (3) provides:

**3. Community colleges.** It is the express legislative intent to foster meaningful collective bargaining for employees of the community colleges. Therefore, in accordance with this policy, the bargaining units shall be structured with one unit in each of the following

occupational groups:

- A. Faculty and instructors;
- B. Administrative staff;
- C. Supervisory;
- D. Support services;
- E. Institutional services; and
- F. Police.

Section 1024-A (5) provides:

**5. Additional bargaining units.** Notwithstanding subsection 1, 2 or 3, the Legislature recognizes that additional or modified university system-wide units, academy units or community college units may be appropriate in the future. The employer or employee organizations may petition the executive director for the establishment of additional or modified university system-wide units, academy units or community college units. The executive director or a designee shall determine the appropriateness of those petitions, taking into consideration the community of interest and the declared legislative intent to avoid fragmentation whenever possible and to insure employees the fullest freedom in exercising the rights guaranteed by this chapter. . . .

The University Act is also unique amongst the other state collective bargaining laws in that it describes with specificity the occupational groups for bargaining units to be created under the Act. The described units for the (now) Community College System have changed over time in the Act. When the Vocational Technical Institutes were first added to the University Act in 1977, the following occupational groups were listed: faculty and instructors, administrative staff, and classified employees (P.L. 1977, Chap. 581). In 1978, the classified employee occupational group was removed from the Act (P.L. 1977, Chap. 641). In 1985, the Act was again amended as it related to VTI bargaining units, and the additional four described occupational groups (supervisory, support services, institutional services, and police) were added (P.L. 1985, Chap. 695). The list of six occupational groups contained in § 1024-A(3) has not changed

since that time. Despite the specific and unique listing of occupational groups in the University Act, the actual MCCS bargaining units have not organized in keeping with the Act. There are currently five organized bargaining units in the System. The "police" bargaining unit (or security) was never organized as a separate unit but employees in that occupational group are, instead, part of the support services bargaining unit. In addition, while the MEA has long represented the "faculty and instructors" employed by the System, there is no separate occupational title of "instructor;" rather, "faculty" is the term uniformly used to refer to all of the teaching staff covered by that agreement.

Based on the plain language of the Act, the Legislature recognized that additional units may be appropriate in the future and empowered the executive director to add units, taking into consideration " . . . the community of interest and the declared legislative intent to avoid fragmentation whenever possible and to insure the employees the fullest freedom in exercising the rights guaranteed by this chapter." The hearing examiner has already set forth findings that the petitioned-for unit of adjuncts has established a community of interest, and thus is an appropriate bargaining unit. The adjuncts have presented sufficient showing of interest to support their placement in a separate bargaining unit, have not expressed an interest in being represented by MEA as their bargaining agent, but rather have expressed an interest in being represented by MSEA. The overarching purpose of the University Act (and all the state collective bargaining laws) is to provide a uniform basis for the covered employees to " . . . join labor organizations *of their own choosing* and to be represented by such organizations in collective bargaining for terms and conditions of employment." § 1021. Therefore, insuring the affected employees their

"fullest freedom" in exercising their collective bargaining rights certainly supports the creation of a new and separate adjunct bargaining unit.

The Legislature has cautioned against "fragmentation whenever possible." The factors outlined above that favor the creation of an adjunct bargaining unit considerably outweigh any concerns regarding fragmentation, however. Indeed, fragmentation (as that term is generally understood)<sup>8</sup> is not a genuine concern on the unique facts presented here. First, in over 30 years since the VTI's were included in the University Act, bargaining units have not proliferated beyond those enumerated in the statute (indeed, there are only five bargaining units rather than the enumerated six). Adding a sixth unit could scarcely be described as "fragmentation" at this point. Second, the vast majority of MCCS employees who are not adjuncts are presently represented in bargaining units - 92 percent. Even the most recently-configured MCCS bargaining units have been stable and in existence for over 20 years. Therefore, there are not many employees left - other than the adjuncts - to create additional bargaining units. Third, granting the petition for all adjuncts limits any fragmentation of this fairly sizeable group of employees. Finally, the arguments for creating an adjunct bargaining unit are certainly more compelling than the arguments presented in the only other instance when a determination was required to add a bargaining unit to the statutorily-created units under the University Act - when a Law School faculty

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<sup>8</sup>It is not entirely clear that the Legislature's concern was too many bargaining units - what the Board has generally described as proliferation. The legislative history of the passage of the original University Act (prior to the addition of the VTI's) reveals that one of the primary concerns of the Legislature was that bargaining units be configured on a system-wide basis rather than on a college-wide basis. It is certainly possible that this was the Legislature's entire concern in using the term "fragmentation." The Union here, of course, is seeking a system-wide unit of adjuncts.

bargaining unit was created as a separate unit from the University of Maine faculty unit by unit determination. Law Faculty Association and the University of Maine, No. 77-UD-03 (MLRB Aug. 4, 1978).<sup>9</sup>

Finally, both parties presented argument ascribing meaning to the fact that the MCCS employed adjuncts at the time the VTI's were added to the University Act. The parties seemed to agree that adjuncts were employed by the VTI's from the time the VTI's were first included in the University Act, although numbers were obviously not as high as the present time. If adjuncts were employed at that time, why didn't the Legislature explicitly include them in one of the listed occupational groups? Even though the teaching occupational group has been consistently described as "faculty and instructors" - with no specific mention of adjuncts - it is hard to ascribe any particular legislative meaning to this. It is possible, for instance, that the Legislature believed the terms "faculty and instructors" was broad enough to include adjuncts (by comparison, § 1024-A provides for only a "faculty" bargaining unit for both the University of Maine System and the Maine Maritime Academy). It is also possible that adjuncts were used far less at that time and were not on the "legislative radar." The fact remains, however, that when the MEA petitioned to create the VTI faculty bargaining unit, it did not seek to include adjuncts and adjuncts have never been included in that bargaining unit. At this point

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<sup>9</sup>The hearing examiner in that case found that the law school operated as an autonomous entity and the law school faculty shared a limited community of interest with the University faculty. Despite the fact that the University Act had been enacted less than two years before the decision, and despite the admonition in the Act that any additional bargaining units must be structured on a system-wide basis, the petition to create a separate law school faculty unit was granted. It is important to note that the law school unit did not thereafter elect a bargaining agent and never negotiated a CBA; likewise, the creation of an adjunct bargaining unit may not necessarily result in an active "fragmented" unit.

in time, if this substantial number of MCCC employees are to have a bargaining unit, it must be created as an additional unit.

For all of these reasons, the hearing examiner concludes that this is an appropriate instance where an additional bargaining unit may be created in the System, within the meaning of § 1024-A.

#### CONCLUSION

On the basis of the foregoing facts and discussion and pursuant to the provisions of 26 M.R.S.A. § 1024-A, the petition for unit determination filed on October 23, 2009, by Maygan Hardison of behalf of MSEA is granted. The following described unit is held to be appropriate for purposes of collective bargaining:

INCLUDED: All adjunct faculty members employed by the Maine Community College System who teach credit courses.

EXCLUDED: All other employees of the Maine Community College System.

A bargaining agent election for this unit will be conducted forthwith.

Dated at Augusta, Maine, this 23rd day of February, 2010.

MAINE LABOR RELATIONS BOARD

/s/ \_\_\_\_\_  
Dyan M. Dyttmer  
Hearing Examiner

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. § 1028(2), to appeal this report to the Maine Labor Relations Board. To initiate such an appeal, the party seeking appellate review must file a notice of appeal with the Board within fifteen (15) days of the date of issuance of this report. See Chapter 10 and Chapter 11, § 30 of the Board Rules.